



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

August 7, 2023

Re: FOIA Request NLRB-2023-001796

Dear Stephanie Wolf:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on July 21, 2023, in which you seek any and all documents related to the cases in *Central City Opera House Association* and *Opera Colorado Opera Center*, Case Nos. 27-CA-321844, 27-CA-320836, 27-CA-319328, 27-RC-319226, 27-CB-308986, 27-CA-308849, and 27-CA-300304 (a total of seven cases). You assumed financial responsibility for the processing of your request in the amount of \$35.00 and also requested a fee waiver.

We acknowledged your request on July 21, 2023. We subsequently divided your request and assigned two of the requested cases (27-CA-319328 and 27-CA-300304) a new request number: NLRB-2023-001808. You will receive a separate response for those two cases. Accordingly, this response is for the five other cases.

Your request is denied in part and granted in part, as explained below.

After conducting a search of the Agency's electronic casehandling system, NxGen, I have determined that four of the five cases, Case Nos. 27-CA-321844, 27-CA-320836, 27-RC-319226, and 27-CB-308986, are open and pending before the Agency. Exemption 7(A) allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with a pending enforcement proceeding. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Therefore, given the open status of the requested cases, release of which could reasonably be expected to interfere with the enforcement proceeding, the requested records are being withheld pursuant to Exemption 7(A).

Further, I have determined that the remaining case (27-CA-308849), while closed, is related to other NLRB cases that are also currently open and pending before the Agency (Case Nos. 27-CB-308986 and 27-CA-320836). Exemption 7(A) of the FOIA permits the Agency to withhold records or information from any or all related case files, even if the requested case is closed, if disclosure could

reasonably be expected to interfere with the related, pending proceeding. 5 U.S.C. § 552 (b)(7)(A); *See New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 385-86 (1st Cir. 1976); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). This is because the FOIA is not intended to function as a private discovery tool. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242. The protections of Exemption 7(A) extend to any record whose release would enable a respondent or potential respondent to tailor a defense or otherwise obtain an unfair litigation advantage by premature disclosure. *See Ehringhaus v. FTC*, 525 F. Supp. 21, 23-24 (D.D.C. 1980); *Swan v. SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996). Moreover, the protection applies until all reasonably foreseeable administrative and judicial proceedings conclude. *See Juarez v. Dep't of Justice*, 518 F.3d 54, 58-59 (D.C. Cir. 2008). Any records contained in the requested case files that may be responsive are thus protected from disclosure at this time. Therefore, your request is denied to the extent that any investigatory records in the requested case files are being withheld in full pursuant to Exemption 7(A). Your request is granted to the extent that the formal records in the requested cases are releasable, as they are available to the public pursuant to NLRB FOIA regulations regardless of the open or closed status of a case (188 pages, attached). Upon my review, redactions have been made to certain information in these records to protect the privacy interests of individuals named in the records, pursuant to FOIA Exemption 6, which protects personally identifying information, the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C).

Please note that the Exemption 7(A) protection is "temporal in nature." *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir 2014) (citing *NLRB v. Robbins Tire*, 437 U.S. 214, 223-24 230-32 (1978)). As such, case file records may become disclosable, subject to applicable exemptions, after the case closes, that is, once a Board decision and/or court order issues, there has been full compliance with a settlement, or the case has otherwise been closed under Agency procedures. Accordingly, you may wish to file a new request at that time.

The status of the open, related case can be tracked on the Agency website at www.nlr.gov by going to the Cases & Decisions tab, clicking case search, entering the case number in the search box and viewing the case page or by clicking the links here:

<https://www.nlr.gov/case/27-CA-321844>
<https://www.nlr.gov/case/27-CA-320836>
<https://www.nlr.gov/case/27-RC-319226>
<https://www.nlr.gov/case/27-CB-308986>
<https://www.nlr.gov/case/27-CA-308849>

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request, and your request for a fee waiver is moot.

You may contact Teresita Sanabria, the FOIA Specialist, who processed your request, at (202) 273-4000 or by email at teresita.sanabria@nrlb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

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Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling
FOIA Officer

Attachment: (188 pages)